

JAN 6 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-798

GULF OIL CORPORATION,

Petitioner,

vs.

LAWRENCE E. MADDOX, Individually and as representative of all that class of gas royalty owners under

Gulf Oil Corporation oil and gas leases in the

Hugoton-Anadarko area,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

***W. LUKE CHAPIN**

CHAPIN AND PENNY

P. O. Box 148

Medicine Lodge, Kansas 67104

Attorneys for Respondents

January, 1978

***Counsel upon whom service is to be made.**

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR NOT GRANTING THE WRIT	6
(a) This Court Should Not Grant a Writ to Con- sider Issues Raisable, If at All, in a Later Pro- ceeding	6
(b) It Would Be Improvident for This Court to Grant a Writ to Consider Questions Readily and Consistently Answered by Its Prior De- cisions	7
CONCLUSION	14
APPENDICES:	
APPENDIX "D" Trial Court's Class Order and Notice	D-1
APPENDIX "E" Trial Court's Findings of Fact and Conclusions of Law	E-1

Authorities

CASES

<i>Advertising Specialty v. Fed. Trade Commission</i> , 238 F.2d 108 (1956)	11
<i>American Pipe & Const. Co. v. Utah</i> , 414 U.S. 542	9
<i>Appleton Electric Co. v. Advance-United Expressways</i> , 494 F.2d 126, 140	10

II

<i>Carpenter v. Pacific Mutual Ins. Co.</i> , 10 Cal. 2d 307, 74 P.2d 761	8
<i>Eisen v. Carlisle & Jacqueline</i> , 417 U.S. 156	9
<i>Hansberry v. Lee</i> , 311 U.S. 32	10
<i>Hartford Life Ins. Co. v. Ibs</i> , 237 U.S. 662	8
<i>International L. & W. Union v. Boyd</i> , 347 U.S. 222 (1954)	7
<i>International Shoe v. State of Washington</i> , 326 U.S. 310	8
<i>Mobil Oil Corp. v. FPC</i> , 463 F.2d 256	4
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306	9, 11
<i>Neblett v. Carpenter</i> , 305 U.S. 297, reh. denied, 305 U.S. 675	8
<i>Northern Natural Producing & Mobil v. Nix, et al.</i> , No. 77-848	2
<i>Phillips Petroleum Co. v. Shutts, et al.</i> , No. 77-856	2
<i>Royal Arcanum v. Green</i> , 237 U.S. 531	8
<i>Shaffer v. Heitner</i> , U.S., 97 S. Ct. 2569 (1977)	9, 13
<i>Shutts, et al. v. Phillips Pet.</i> , 222 Kan. 527, 567 P.2d 1292	2, 3, 4, 5, 6, 8, 9, 13, 14
<i>Snyder v. Harris</i> , 394 U.S. 332	10, 12
<i>Sovereign Camp v. Bolin</i> , 305 U.S. 66	8
<i>Supreme Tribe of Ben-Hur v. Cauble</i> , 255 U.S. 356	8, 13
<i>The Superior Oil Co. v. Sterling, et al.</i> , No. 77-847	2
<i>Zahn v. International Paper Co.</i> , 414 U.S. 291	13

ARTICLES AND MISCELLANEOUS

Advisory Committee Notes, 28 U.S.C.A. 302	9, 10
30A C.J.S. Equity §1456	12
Chaffee, "Some Problems of Equity" (1950) 258	11

III

71 Colum. L. Rev. 601, 641, Homburger	13
43 F.R.D. 39, Judge Frankel	13
25 Hastings L. J. 1411	12
3B Moore's Federal Practice, ¶23.11	11
Restatement of Judgments §26	11
Restatement of Judgments Second §85	12

STATUTES

F. R. Civ. P. 23	6, 10
K.S.A. 60-223	2, 6

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-798

GULF OIL CORPORATION,
Petitioner,

vs.

LAWRENCE E. MADDUX, Individually and as representative of all that class of gas royalty owners under Gulf Oil Corporation oil and gas leases in the Hugoton-Anadarko area,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas are as reported in the Petition. The Trial Court's Class Order and Notice is attached hereto as Appendix D and the Trial Court's Findings and Conclusions are attached hereto as Appendix E.

JURISDICTION

The jurisdictional requisites are set forth in the Petition for Certiorari.

QUESTION PRESENTED

The federal question, if any, is: Whether it is a violation of Gulf's due process rights or equal protection for nonresident members of plaintiff class to be included in the benefits of a Kansas State Court judgment against Gulf.

STATUTE INVOLVED

K.S.A. §60-223, Kansas Class Action Statute, as set forth in Appendix C to the Petition.

STATEMENT OF THE CASE

This is one of four cases in which major oil and gas producing companies are seeking review of opinions of the Supreme Court of Kansas finding the companies liable for interest on gas royalties *suspended* and *used* by the companies pending Federal Power Commission opinion and approval of the opinion. The other cases are:

Phillips Petroleum Company v. Shutts, et al., No. 77-856;

Northern Natural Producing Company and Mobil Oil Corporation v. Hazel Nix, et al., No. 77-848;

The Superior Oil Co. v. Sterling, et al., No. 77-847.

Beginning in 1965, Gulf began collecting from its gas purchasers in the Hugoton-Anadarko area on the basis of increased rates as filed with the Federal Power Commission, but Gulf continued paying its gas royalty owners on the basis of the old rates.¹

1. See Appendix B-9, Gulf's Petition for Writ of Certiorari; also *Shutts, et al. v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292.

The Hugoton-Anadarko area is a rate making area for gas production as defined by the Federal Power Commission and it consists of all of the State of Kansas and certain parts of the states of Texas and Oklahoma, including *Hansford County, Texas*, where plaintiff Lawrence E. Maddox has a royalty interest under defendant Gulf's Edna Maddox oil and gas lease. (See *Shutts*, Appendix B-8.)

Plaintiff Maddox filed this action individually and as representative of that class of oil and gas royalty owners under defendant Gulf's oil and gas leases in the Hugoton-Anadarko rate making area.

The increase in gas rates collected by Gulf went into Gulf's corporate treasury, was commingled with other corporate funds and was used by Gulf as a part of its business operations.²

FPC Opinion No. 586 was entered on September 18, 1970, approving most of the rate increases filed. The validity of FPC Opinion No. 586 was challenged in the courts and finally sustained on October 28, 1972.³

Subsequently, in February, 1973, 1,971 of Gulf's gas royalty owners were paid \$987,823.41 as their royalty interest share of the suspended rates. This amount was the royalty interest share (normally 1/8th), without interest.

Portions of the suspended rates were not approved and were refunded to defendant Gulf's gas purchasers with interest at the rate of 7% per annum until October 1, 1970, and at the rate of 8% per annum thereafter until refunded.⁴

2. See Appendix A-2, Kansas Supreme Court Opinion in this case.

3. See *Shutts*, Appendix B-14.

4. See *Shutts*, Appendix B-9.

The FPC has no jurisdiction over amounts paid to gas royalty owners (*Mobil Oil Corp. v. Federal Power Commission*, 463 F.2d 256) (D.C. Cir.), cert. denied, 406 U.S. 1976 (1972) and had no regulations purporting to cover interest in relation to royalty interests in the suspended payment held and used by Gulf.

Plaintiffs were allowed to proceed by order of the Kansas District Court, as a class action, and all members of the class were served with notice by first class mail and by publication.⁵

Gulf was not required by FPC or any other authority to keep the royalty owners' share of suspense monies in suspense and not pay it out; this was a matter determined by Gulf.⁶

Ordinarily, if a question of jurisdiction were to be raised as to nonresident members of plaintiff class, it would be raised by a nonresident member in the court of another state, after judgment against plaintiff class. However, in this case, Gulf attempts to raise the question of jurisdiction of the Kansas courts over nonresident members after judgment in favor of plaintiff class, in order to save itself from paying a substantial part of the judgment against it. Statutes of limitation have run against the payment of interest on the FPC suspense royalties in Oklahoma and Texas.⁷ Royalty owners in the Hugoton-Anadarko area are not entitled to go into the federal court and bring a class action because many of the claims are less than \$10,000.00.⁸ This leaves the Kansas court as the only

5. See Appendix D, this Brief for full copy of Trial Court's Class Order and Notice.

6. See *Shutts*, B-49.

7. See *Shutts*, B-27.

8. See *Shutts*, B-26.

forum and the Kansas court's judgment in this case as the only possibility of nonresidents obtaining interest on the FPC royalty funds here involved.

Gulf does business in Kansas and has been duly served with process in Kansas. No question is asserted as to the jurisdiction of the trial court or the Supreme Court over the defendant or the trial court's power to enforce a judgment against the defendant.

Gulf asserts the class includes nonresidents having no contact with Kansas. (Question Presented, Petition 3.) Not so. Whether or not "minimum contacts" are necessary, the many contacts that tie this certain group of Gulf royalty owners together are enumerated in the *Shutts* opinion, B-43 and 44, as follows:

1. The names, addresses and suspense royalty amounts for each of the royalty owners are readily available in Gulf's records.
2. The class is more manageable with nonresidents of Kansas included because Gulf would be required to take an extra step in separating nonresident royalty owners in its records.
3. Gulf treated all royalty owners in the Hugoton-Anadarko area alike, regardless of residency, particular lease provisions or royalty agreements.
4. Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Gulf is doing business and producing gas which it sells in interstate commerce.
5. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Gulf and a common

interest in the money collected by Gulf as "suspense royalties" from the sale of gas in the designated area.

6. It was the same FPC regulation that caused and permitted Gulf to collect the "suspense royalties", and the same FPC Opinion No. 586 pursuant to which the "suspense royalties" were paid out to the royalty owners in the area.

7. All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the "suspense royalties" by Gulf, payable as interest, and they have a contact with Kansas by reason of such common interest.

Judgments and orders of the trial court herein were affirmed by the Kansas Supreme Court except as to the rate of interest, which was increased from 6% to 7% and 8%. (A-5.)

REASONS FOR NOT GRANTING THE WRIT

The decision of the Kansas Supreme Court is thorough and thoughtful. The state court was fully aware of and closely adhered to the decisions of this Court. Gulf raises no issue not considered and answered in the Kansas Court's opinion. (See *Shutts*, Appendix B-1 to 59 of Petition; See also the Kansas Class Action Statute, 60-223, which closely follows Federal Rule No. 23, at Appendix C of Petition.)

This Court Should Not Grant a Writ to Consider Issues Raisable, If at All, in a Later Proceeding

Gulf suggests it is denied equal protection and due process because members of the plaintiff class over whom

Kansas did not have personal jurisdiction are not bound by the Kansas court judgment, and thus could relitigate their claims. Without conceding for a moment class members are not bound, it is significant Gulf's argument bears considering only in the event class members attempt to relitigate their claim.

This case cannot possibly raise that issue. In *International L. & W. Union v. Boyd*, 347 U.S. 222, 224 (1954), this Court held:

"Determination of the scope of constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case, involves too remote and abstract an inquiry for the proper exercise of the judicial function."

The Kansas court judgment granted to members of the class everything they filed suit to secure. It is far too tenuous to assume first, a dissatisfied class member exists; second, if he does exist, he will try to relitigate the claim, having secured by Kansas judgment all he could possibly obtain; and third, if he tries to relitigate the claim the forum court will find he was not bound by the Kansas court judgment.

Thus Gulf asks this Court to supply a wholly hypothetical answer to its wholly hypothetical question.

It Would Be Improvident for This Court to Grant a Writ to Consider Questions Readily and Consistently Answered by Its Prior Decisions

Even if Gulf's case is not hypothetical, it is contrary to this Court's opinions and well established law.

There is no challenge to the *in personam* jurisdiction over the defendant, or the Kansas court's power to enforce

a judgment against the defendant. (See *Shutts* at B-20.) Nevertheless, Gulf relies on *International Shoe v. State of Washington*, 326 U.S. 310 and others pertaining to acquiring jurisdiction over a defendant. (Petition 4.) The class fully agrees with the holding of these cases. They are, however, thoroughly inapposite.

None of such cases were class actions. There was no plaintiff or defendant class in any of them. (See discussion of these cases in *Shutts*, B-21-23.)

"Minimum contacts" has always been held to apply to a defendant. It has never been applied to a plaintiff.

Even if "minimum contacts" does apply, there were sufficient contacts here to justify the exercise of jurisdiction. (See *Shutts*, B-43, 44.) Since Kansas had *in personam* jurisdiction over the defendant, it likewise had jurisdiction over the common fund and thus contact with all persons who shared in the fund. For this reason, in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 59 L. Ed. 1165, 35 S. Ct. 692, this Court held a Minnesota resident bound by an earlier Connecticut State Court judgment.⁹

In this case, the Kansas Court said:

"To hold that Phillips' act of using the money for business purposes, and not putting it in a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the expense of innocent gas royalty owners." (*Shutts*, B-37.)

9. *Shutts*, B-34-38; and other common fund cases: *Royal Arcanum v. Green*, 237 U.S. 531; *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356; *Sovereign Camp v. Bolin*, 305 U.S. 66; *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761 (1937), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297, *reh. denied*, 305 U.S. 675.

Therefore, it was proper to include in the class all contributing to it, residents and nonresidents of Kansas alike.

Contacts also arose because of the first class mail notice sent to residents and nonresidents. The notice advised recipients of the pendency of the suit in Kansas, the nature and effect of the suit, afforded them an opportunity to opt out and informed them by remaining in the class they would be bound by any judgment, favorable or unfavorable. (See generally, App. D-4 thru D-6.)

Without regard to contacts, first class mail notice provided the essential requisites of due process so as to bind members of the class.¹⁰

Due process was also afforded class members by adequate representation. See *Eisen* at 176. In *Shutts* at B-42, the court states regarding the same attorneys:

"Here we find adequate representation has been accorded the plaintiff class members by their representative through his attorneys who have done a superior job in bringing this action and arguing and briefing the law on this appeal."

Gulf's reliance on the territorial boundaries of Kansas is equally misplaced. Procedural due process guarantees are the test of a binding judgment and the test for proceeding as a class action. Gulf's argument evidently rests on *Pennoyer* and its progeny, which "simply makes the point that the states are defined by their geographical territory." *Shaffer v. Heitner*, U.S., 97 S. Ct. 2569, 2580 (1977).

10. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 176; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306; Cf. *American Pipe & Construction Co. v. Utah*, 414 U.S. 542, 549; also *Advisory Committee Notes*, 28 U.S.C.A. at 302, where it is said "notice . . . is designed to fulfill requirements of due process to which the class action is of course subject."

Gulf overlooks F. R. Civ. P. 23 does not expand federal court jurisdiction (*Snyder v. Harris*, 394 U.S. 332), yet typically binds class members with no contact with the forum.

Moreover, the propriety of binding absent class members outside the jurisdiction of the forum court was decided long ago. This is because there is a difference in the jurisdictional standards governing class actions and other actions. In *Hansberry v. Lee*, 311 U.S. 32, this court found:

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party . . .

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, . . . may bind members of the class or those represented who were not made parties to it . . .

Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown . . . 311 U.S. at 40-2 (Emphasis supplied.)

To bind absent class members, the due process protections of notice and representation must be afforded.¹¹ This

11. See page 140 of *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126, where it is said: "The notice and exclusion provisions of Rule 23 (c) (2) were designed to 'fulfill requirements of due process to which the class action procedure is of course subject.' 28 U.S.C., Rule 23, Advisory Committee's Note at 302. The clearest statement of those requirements is in (Continued on following page)

was provided here and Gulf challenges neither the method of notice nor the form or quality of representation.

In *Advertising Specialty National Ass'n v. Federal Trade Commission*, 238 F.2d 108, 120 (1st Cir. 1956), the court found foreign members bound by a judgment in a proper class suit even though outside the jurisdiction.

Many commentators have considered the question raised by Gulf. They support the Kansas court's decision on the issue. Professor Chafee in *Some Problems of Equity*, 258 (1950) notes the Restatement of Judgments "gives the court where a class action has been properly brought, jurisdiction to bind unnamed members, even if not personally within the jurisdiction of the court." Likewise, Professor Moore in his treatise, 3B Moore's Federal Practice, ¶23.11 (5), in discussing the 1928 Federal Rules of Civil Procedure 23 indicates:

"The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment."

The Restatements are also in agreement. The Restatement of Judgments states:

Section 26. Representative or Class Actions.

"Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved

Footnote continued—

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To be bound by a final judgment in a representation suit, one must be 'informed that the matter is pending and [have the opportunity] to choose for himself whether to appear or default, acquiesce or contest.' 339 U.S. at 314, 70 S. Ct. at 657. The kind of notice mandated in *Mullane* is exactly the kind of notice defendant class members will receive in this case . . . The members' contacts with the forum are as irrelevant here as were beneficiaries' contacts with the State of New York in *Mullane*."

in the action which will be binding as *res judicata* upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

Tentative draft number 2 of the Restatement (Second) of Judgments §85 (April 15, 1975) provides:

"(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to the service of process."

See also, Note, "Consumer Class Action of a Multi-State Class: A Problem of Jurisdiction," 25 *Hast. L. J.* 1411, 1432, 1435 (1974);¹² and 30A *C.J.S. Equity* §1456 (4) at 124.

This Court has implicitly concluded class actions with a multi-state class can and should be brought in state courts. In *Snyder v. Harris*, 394 U.S. 332, the Court noted class actions premised on diversity of citizenship can "most appropriately be tried in state court" (*Id.* at 341) and plaintiffs "had nothing to fear from trying the lawsuit in the

12. 25 *Hastings Law Journal*, 1411, pages 1432 and 1435: "A class action must proceed in the absence of almost every class member. Therefore, ultimately, the residential makeup of a class is unimportant. What is important is that the rights of absent members be justly protected and that members be given an opportunity to be heard if they so desire. These are the essential elements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, whereas the essential element necessary to establish jurisdiction over a non-resident defendant is some tangible connection between him and the forum state, the element necessary to the exercise of jurisdiction over plaintiff classes is procedural due process. (Emphasis supplied.) (Page 1432.)

"It is . . . the suggestion of this note that by adhering to the same jurisdictional standards of due process required on the federal level, state courts can exercise jurisdiction over a class action regardless of the citizenship of the class members." (Page 1435.)

courts of their own state." (*Id.* at 340.) (See, also *Zahn v. International Paper Co.*, 414 U.S. 291.) This led the court in *Shutts* to question, at B-26, "[i]f the state courts will not hear the matter, who will grant relief?" See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366.

The meaning of the words "due process" evidently escapes Gulf. Fair play and substantial justice have been afforded all. "Fair play and substantial justice" (as called for in *Shaffer v. Heitner*, *supra*) can only be afforded non-resident members of plaintiff class by allowing them the benefit of their judgment against Gulf—not by taking it away from them. And *in personam* judgment against the defendant has been rendered which will benefit class members who after notice and representation elected to stay in the class.

Judge Morris E. Frankel noted:

"If all the pertinent criteria are fairly satisfied, I believe we'll discover that the preliminary shock of 'binding' absent people will subside or disappear and that the intended functioning of the [class action] rule . . . actually promotes essential fairness and justice no less than the secondary goal of judicial efficiency." (43 *F.R.D.* 45, 46.)

See also Homburger, "State Class Actions and the Federal Rule," 71 *Colum. L. Rev.* 601, 641 (1971), arguing in many cases the denial of class relief would be "tantamount to the denial of substantive justice." Separate suits in each of the forty states where class members reside would be an extraordinarily inefficient, expensive and burdensome method of proving the liability. Gulf is merely attempting to eliminate or diminish its liability through a subterfuge.

The decision of the Kansas court clearly is correct and consistent with the decisions of this Court and other well established law. Gulf raises no questions not answered by the opinion in *Shutts*, and this Court's own decisions.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

W. LUKE CHAPIN

CHAPIN & PENNY

P. O. Box 148

Medicine Lodge, Kansas 67104

Attorneys for Respondents

January, 1978

APPENDIX D

TRIAL COURT'S CLASS ORDER, MADDOX V. GULF

CLASS ORDER AND ORDER FOR NOTICE

On the 2nd day of August, 1974, this matter comes regularly on for hearing on the Plaintiff's Motion for an Order determining this action to be a class action. Plaintiff is present by his attorneys W. Luke Chapin, of Chapin & Penny, Medicine Lodge, Kansas, and Gary Hathaway of Hathaway & Kimball, Ulysses, Kansas. The Defendant is present by its attorneys, Edwin S. Hurst, of Tulsa, Oklahoma, and James R. Yoxall of Light, Yoxall, Antrim & Richardson, Liberal, Kansas. There are no other appearances.

THEREUPON, Plaintiff's Motion is presented and argued to the Court. Thereafter, the matter is briefed by counsel for the parties; and the Court, having examined the pleadings and files herein, having heard the statements and arguments of counsel, having read the briefs, and being well and fully advised in the premises, files his Memorandum Opinion herein dated November 7, 1974, which is made a part hereof by reference and further finds that this action should be maintained as a class action, subject to the limitations and conditions hereinafter set forth.

And the Court further specifically finds that:

1. The class hereinafter defined is so numerous that joinder of all members is impracticable; there are ques-

tions of law and fact common to the class; the claim of the representative party is typical of the claims of the class; the representative party plaintiff will fairly and adequately protect the interests of the class; the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interest of the other members not parties to such adjudications and might substantially impair or impede their ability to protect their interests; and the questions of law and fact common to members of the class predominate over any questions affecting only individual members and a class action is superior to the other available means for the fair and efficient adjudication of the controversy.

2. The plaintiff class shall be limited to all persons who were in or prior to February, 1973, entitled to gas royalties (excluding overriding royalties) under leases held by Gulf Oil Corporation or any of its predecessor companies on lands in the Hugoton-Anadarko area and who received, in 1973, payment of additional amounts of royalty attributable to increased prices paid to defendant in and after 1965, as a result of F.P.C. Opinion No. 586.

3. Notice of the nature and pendency of this action and the effects of any judgment herein shall be given to members of the above defined class as follows:

(a) Each member of the class as herein defined whose name and address is contained in defendant's records shall be notified of the pendency and ultimate legal effect of the action and of the right to request exclusion, by sending to each such class members a notice in form of Exhibit "A", which is attached hereto and made a part hereof by this refer-

ence. To the extent that such persons are currently the recipients of royalty payments by defendant, the aforesaid notice shall be dispatched to them by defendant with the next royalty payment disbursed to them. The cost of such mailing, including labor and any postage in addition to the postage required to be paid in connection with the regular royalty distributions, shall be taxed as costs herein.

(b) Defendant shall furnish to counsel for plaintiffs the names and addresses, to the extent such information is reflected by defendant's books and records, of all persons included in the plaintiff class who are not currently receiving royalty payments from defendant. Plaintiff shall cause to be mailed to each of said persons a copy of the Notice attached hereto as Exhibit "A".

(c) As soon as possible hereafter, defendant will advise counsel for plaintiff of the approximate number of notices required to be mailed to royalty owners as stated above and plaintiff will supply a sufficient number of copies of the Notice for the mailings. Mailings should be made in December, 1974, and the time limitation for those desiring to be excluded should be no later than February 7, 1975, at 10:00 A.M., at which time a hearing will be held to determine actual class members.

(d) Plaintiff shall cause the Notice attached hereto as Exhibit "A" to be published once each week for three consecutive weeks in a newspaper of general circulation published in the following locations: Amarillo, Texas; Elkhart, Kansas; Liberal, Kansas; and Guymon, Oklahoma.

(e) Plaintiffs will advance the costs pertaining to publication as stated above and pertaining to mailing to class members not currently receiving royalty payments from defendant and such mailing and publication costs shall be taxed as costs herein.

4. The Court further finds that this Order certifying the class involves a controlling question of law; namely the jurisdiction of this court as to all members of the class, and to which there is a substantial ground for difference of opinion and that an appeal from this Order certifying the class will materially advance the ultimate termination of the litigation, and the implementation of this order is stayed pending such appeal.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT That the foregoing findings should be and they are hereby made the order and judgment of this Court.

Entered this 2nd day of December, 1974.

NOTICE OF CLASS ACTION

TO: All persons who were on or before February, 1973, entitled to gas royalties (excluding overriding royalties) under leases held by Gulf Oil Corporation, or any part of its predecessor companies, on lands in the Hugoton-Anadarko area and who received, in 1973, payment of additional amounts of royalty attributable to increased prices paid to Defendant in and after 1965, as a result of F.P.C. Opinion No. 586:

This suit was filed in January, 1974, by Lawrence E. Maddox, in his own behalf and on behalf of all persons to whom this notice is directed. He asks judgment against

the oil company and for the payment of interest on increased royalties received and withheld by Defendant, pending final approval by the Federal Power Commission. The leases involved are in Kansas, and in parts of Texas, and Oklahoma. There are about 1,971 members of the proposed class. Such gas royalties held by Gulf and paid out in February, 1973, amounted to \$987,823.41.

Defendant has denied any liability to the plaintiff or members of the class hereinafter described.

The Court has held that this action is to be maintained as a class action. Accordingly:

1. The Court will include as members of the plaintiff class herein all of the gas royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Seward County, Liberal, Kansas 67901, on or before the 1st day of February, 1975, be excluded from the class unless upon notice and after hearing, and for stated reasons the Court finds that their inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if he so desires, may appear in the case in person or through his own counsel; otherwise, plaintiff's counsel will represent him as a member of plaintiff class.

2. Judgment in this action, whether for the plaintiff class or for the Defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.

3. Plaintiff's attorneys' fees are contingent on recovery. If the plaintiffs are successful, the Court will allow a reasonable attorneys' fee for plaintiffs' attorneys out of

the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees.

KEATON J. DUCKWORTH, Judge
of the 26th Judicial District

CHAPIN & PENNY, Box 148
Medicine Lodge, Kansas 67104
and

HATHAWAY & KIMBALL, 212 N. Main
Ulysses, Kansas 67880
Attorneys for Plaintiff

EDWIN S. HURST, P. O. Box 1589
Tulsa, Oklahoma 74102, and

LIGHT, YOXALL, ANTRIM & RICHARDSON
P. O. Box 1278, Liberal, Kansas 67901
Attorneys for Defendant

APPENDIX E

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW MADDOX V. GULF

FINDINGS OF FACT

Undisputed facts in this matter are as follows:

1. Plaintiff Lawrence E. Maddox filed this action individually and as representative of that class of oil and gas royalty owners under defendant's The Gulf Oil Corporation, oil and gas leases in the Hugoton-Anadarko production area. Plaintiff is a resident of Kansas with royalty interest in the Texas portion of the Hugoton-Anadarko production area.

2. Defendant is a natural gas company within purview of the Natural Gas Act and since the Phillips decision has been subject to rate regulation by the Federal Power Commission (FPC).

3. Commencing in 1965 and pursuant to FPC regulations, defendant received rates based on contracts with their purchasers in various amounts which were subject to FPC approval. Under each higher rate negotiated the FPC permitted the defendant to receive the new rate pending final approval by posting a bond and requiring interest to be paid to the purchasers for any amounts received in excess of the finally approved rate. The burden on the FPC of a nearly infinite number of applications for rate approval resulted in the Hugoton-Anadarko area rate Opinion No. 586 entered September 18, 1970. The validity

of FPC Order No. 586 was challenged in the courts and finally sustained on October 28, 1972.

4. Subsequently, in February, 1973, 1971 royalty owners were paid \$987,823.41 as their royalty interest share of the suspended areas. This amount was the royalty interest share (normally 1/8th) without interest. Portions of the suspended rates not approved were refunded to defendant's purchasers with interest at the rate of 7% per annum until October 1, 1970, and at the rate of 8% per annum thereafter as required by FPC regulation 154.102 (c) and Order No. 586.

5. The FPC has no jurisdiction over royalty rates as such (*Mobil Oil v. Federal Power Commission*, 464 F.2d 256) and had no regulations purporting to cover interest in relation to royalty interest in the suspended payments held by defendant.

6. Plaintiffs were allowed to proceed by previous order of this court as a class action and all members of the class were served with notice by first class mail and by publication.

7. Plaintiffs by this action seek interest on the royalty owners' share of the increased rates collected by the defendant and held as "suspended royalties" until approved by FPC Order 586. These monies were collected by defendant and commingled with its other funds for operational purposes.

8. The royalty owners were not advised by the defendant during the time the suspense royalties were being held that the suspense royalties were being held pending final approval by the FPC.

9. No demand for interest was made on the defendant until the filing of this action and the disbursement

of the suspended royalties in 1973 did not include an accounting of the rates involved nor did it contain any indication as to whether or not interest was included.

ISSUES

Plaintiff contends it is entitled to judgment for interest on the "suspended royalties" from date of receipt herein on the following grounds:

1. Statutory interest based on implied contract because of the use of money by defendant belonging to royalty owners and resulting trust or constructive trust.

2. Equitable relief based on Quasi contract or because of unjust enrichment accruing to defendant by use of funds belonging to others than defendant.

Defendant contends:

1. That a class action is improper because the court lacks jurisdiction of all members of the class and also because of varying laws in the States of Kansas, Oklahoma and Texas.

2. The leases herein were subject to the Natural Gas Act and orders of the FPC under provisions that the leases were subject to all Federal and State laws and regulations which limited the bases for computation of royalty rates to those actually paid and finally approved by the FPC which rates were in fact paid by defendant herein.

3. That there was no liquidated amount until final FPC approval and hence no figure on which to compute interest on either a damage or contract theory of recovery.

4. That the statute of limitations as well as laches, estoppel and accord and satisfaction preclude recovery herein.

CONCLUSIONS OF LAW

1. This is a proper class action under the provisions of KSA Supp. 60-223 because:

(a) The 1971 royalty owners in the Hugoton-Anadarko area make joinder impracticable;

(b) Any interest due each member of the class is too small to justify separate actions;

(c) Questions of fact and law are common to all members in that the facts are really undisputed and the sole legal issue presented is whether the plaintiff members are entitled to interest on the suspended royalties held by defendant;

(d) The claims of the named parties herein are typical of the claims of all members of the class and will fairly and adequately protect the interest of the class;

(d) The question presented common to all members of the class predominate over any individual question and a class action is not only superior but the only efficient manner to adjudicate the dispute herein (to avoid multiple suits and excessive expenses) and that this court having jurisdiction of a large physical portion of the Hugoton-Anadarko area is a convenient forum for such action.

2. Defendant, in compliance with its contractual duty with its royalty owners, secured the best price obtainable under the FPC regulations. These regulations required defendant to post bond and agree to the interest pay back provisions to its purchasers or to forfeit the negotiated price increases until final FPC approval.

3. The portion of the increased rates secured under the above paragraph that applied to the royalty share of the proceeds was to be paid to royalty owners or to

be refunded if not approved by the FPC. This royalty share did not belong to the defendant whether or not the rate was approved by the FPC.

4. These monies were held on account for the royalty owned and no cause of action accrued until the February, 1973, distribution of the "suspended royalties" as to the amount of royalties (not in issue herein) or the question of interest payable as a result of the withholding. Since the petition herein was filed January 18, 1974, not even the implied contract statute of limitations of three years in Kansas and Oklahoma (and four years in Texas) has run and the court finds the longer written contract limitation should apply.

5. The defendant concomitant with its duty to its royalty owners to secure the best price obtainable (under its covenant to market) had the duty to remit the collected share of royalty as promptly as commercially feasible on the same conditions as it was received by defendant or in the alternative to place the funds in a proper investment fund for subsequent disbursement. The fact that FPC permitted and essentially required defendant to post bond and agree to pay back interest if a refund was ordered did not entitle defendant to free use of the royalty owners' share of the increased proceeds. The FPC bond and interest pay back requirements certainly justify and permit defendant business use of the increased rates of its own share of those rates but not the royalty owners' share which did not belong to defendant under any eventual ruling by the FPC. See *Phillips Pet. Co. v. Adams*, 513 F.2d 355. The Court therefore concludes that the defendant is liable for interest on royalty proceeds retained by it and used as a business asset by it pending final FPC approval and conclusion of litigation based on its

contractual duty to remit royalty proceeds in a reasonably prompt manner. It is specifically not the basis of this decision that such duty arises from a resulting trust theory or to attempt to impose any facet of fiduciary relationship to the defendant.

6. The evidence proffered by plaintiff consisting of the profit and loss statements of defendant and reports relating to economic inflation were based on a theory of unjust enrichment and is excluded and not considered herein. Nor is the FPC regulation requiring interest of the royalty share returned to the purchasers controlling herein. The FPC regulation in point herein did not and could not for lack of jurisdiction to do so, attempt to regulate the obligation between defendant and members of the plaintiff class herein as to the time or manner or amount of the royalty interests to be paid out of the increased rates.

7. The royalty owners were entitled to rely on defendant to collect the best price obtainable and to represent the royalty owners' interest before the courts and the FPC (as a result of the implied lease covenant). This does not imply, however, consent for the defendant to use the royalty proceeds as a business asset resulting in the economic gain of interest to defendant to the exclusion of the royalty owners.

8. The acceptance without an accounting as to rates or interest of payment of the suspended royalties herein in February, 1973, did not constitute accord and satisfaction because there was no basis for the royalty owners to know what was involved in the payment. For the same reason estoppel does not apply to preclude recovery herein. Laches does not apply for reasons stated herein pertaining to the statute of limitations.

9. Division orders and unitization orders cannot be construed to modify the lease obligations of the defendant, being instruments reflecting royalty owners' interest in proceeds from production and unitization of acreage for allowables respectively. No consideration is reflected in these instruments, executed subsequent to the original leases herein, were contracts to modify the royalty provisions of said leases.

10. The statutory rate of interest here in Kansas, Oklahoma and Texas is 6% per annum and is allowed as the proper rate of interest to be applied to the suspended royalties herein from time of receipt until date of judgment herein with interest compounded on an annual basis.

11. Excluded from this judgment are those parties who have filed their elections herein to be excluded as members of the plaintiff class.

JUDGMENT IS THEREFORE entered for the Plaintiff Class as set forth herein with Defendant ordered to account to the Court as set forth herein for members of Plaintiff Class.

The issue of attorney fees is reserved pending the accounting ordered herein.

Dated January 9, 1976.

(Filed January 9, 1976.)